No. 95-1980

(5)

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In The

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN, JUDITH RIVKIN, t/a GALAXY MANOR, a New Jersey Partnership,

Petitioners,

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

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Cases Cited:

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I

PRELIMINARY STATEMENT

In its Counterstatement of the Case, Dover Township Rent Leveling Board (hereinafter the "Board") criticizes the Rivkins' alleged omissions of procedural details of the remand which followed the trial court's initial finding that the Board had violated Petitioners' due process rights. In reply, the Rivkins point out that their statement of the case closely followed those facts recited by the New Jersey Appellate Division and the New Jersey Supreme Court in their rulings below. In the same vein, the Rivkins followed the lower courts' view that the only facts which were important to the determination of the case were that in the absence of the Board member who tainted the original proceedings, a new panel awarded Petitioners nearly two and one half times more capital improvement rent increases. This, in turn, dramatically underscored the impact the biased Board member had on the rest of the Board in the original hearings.

FURTHER REASONS FOR GRANTING THE WRIT

I.

PETITIONERS HAVE ALLEGED AND SHOWN A DENIAL OF EQUAL PROTECTION.

In Point One of its opposition, the Board asserts that the record below does not support the Rivkins' equal protection claims which are based on "purposeful discrimination" under this court's ruling in *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944). *Snowden* supported a finding of equal protection violations if the claimant could show "an element of intentional or purposeful discrimination". It further noted that such an element "may appear on the face of the action taken with respect to a particular class or person . . . . *Id.*, at 321 U.S. at 8, 64 S. Ct. at 401, 88 L. Ed. 497. Baltarzuk's declaration that he was

"here to serve the people of the mobile home parks" leaves little doubt that he purposefully discriminated against landlords in general and his constant pattern of harassment, threats and adversarial abuse leaves little doubt that he purposefully discriminated against the Rivkins in particular.

In the same point, the Board misdirects its argument against the Petition, claiming that the Rivkins' equal protection claim attacks the Dover Township Ordinance. This is simply not the case as the Rivkins contend that it was the specific acts of the Board that were "purposefully discriminatory", resulting in a violation of their equal protection rights. Since *Parrat v. Taylor,* 452 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) does not bar Section 1983 claims based on equal protection, the balance of the Board's argument concerning the equal protection claim has no bearing on the issue.

The Board incorrectly states that the New Jersey Supreme Court assumed "arguendo a substantive due process violation for the purpose of being able to address it." (RB 3). A proper reading of New Jersey's Supreme Court decision shows that it clearly held, as its key ruling, that the behavior complained of did not constitute substantive due process violations. The essence of this appeal is that New Jersey's sharp restrictions on substantive due process claims based on biased municipal agency action are incorrect as a matter of law and in direct conflict with numerous other federal court rulings.

The Board also incorrectly states that the New Jersey Supreme Court and Appellate Division viewed the Board's behavior as "crude" or "out of line with appropriate Board member behavior". However, as noted in the New Jersey Supreme Court's decision, all three New Jersey courts acknowledged that the record of the rent control hearings clearly established that Board member Baltarzuk was biased, that he

acted as an advocate for the tenants, that he had sought information outside the record, and that he had tainted the deliberations of the Board. (Appendix A, 4a-5a). This case is about much more than "crude" or generically "inappropriate" behavior. It is about conduct which is on its face biased and deliberately aimed to harm the applicant. It is about conduct which should be deemed constitutionally unacceptable.

II.

THE PETITIONER HAS STATED SUBSTANTIAL REASONS FOR GRANTING THE WRIT.

At Point Two of its opposition, the Board declares that there is no basis stated in the Petition for this Court to exercise its jurisdiction. The Rivkins' argument is labeled as merely "entreaty". However, the Rivkins have stated numerous and substantial reasons for granting the Writ. They specifically pointed out the divergence of opinion between various Circuit Courts and the clear conflict between the New Jersey decision in this case and the opinion of many federal Circuit Courts that substantive due process violations can and do occur in the context of municipal agency action which is biased, arbitrary or unreasonable. This is not mere "entreaty" but falls squarely within Rule 10(b) of the Rules of the Supreme Court of the United States which states under "Reason for Granting Petitions for Certiorari" that the court may grant the Writ when:

> (b) A state court of last resort has decided an important Federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. . . .

The New Jersey Supreme Court itself recognized that its

decision fell within the scope of Rule 10(b). *See* PB 6; Appendix A, 17a.

III.

THE BEHAVIOR OF THE BOARD AND BOARD MEMBER BALTARZUK CONSTITUTED SUBSTANTIVE DUE PROCESS VIOLATIONS.

The Board's opposition brief states "it is important to note that the trial court did not determine that what the Board did or did not due was improper" (PA81, PA85) ". . . In fact, no court has ever found that the Board itself was prejudiced. Only the one member was, at most." (RB7). The Board overlooks the following colloquy between its counsel (Mr. Babcock) and the trial court on February 16, 1993 as follows:

> Mr. Babcock: . . . [W]hat I mean by that is not only what the law indicates as I understand it, but that Your Honor's ruling in November of 1991 did not find any malfeasance, improper conduct, unconstitutional conduct as I understand it by the Dover Township Rent Leveling Board. It found it as to an individual and that individual infected the ultimate decision. Now maybe I'm pursuing an issue that Your Honor feels is already crystal clear in terms of the order entered. If that is the case, I don't know if the Court feels any need to clarify that at this juncture, but I certainly still don't understand that this court found the Rent Leveling Board to have committed unconstitutional acts.

> The Court: Well I found that because of the actions of Mr. B (Baltarzuk) in this case that his actions permeated the Board, that the Board allowed his actions and comments to affect their judgment in the case and, therefore, the Board was recalcitrant with respect to this matter as Mr. B being the, if you will, the yeast in the decision making. But they allowed and accepted his comments and incorporated it into their findings, and as I remember it he came off with a number that was nowhere, that actually had no factual basis, and that was, but what I am saying to you is that I think that in allowing him to continue descent (to sit?), and I think that Mr. Levin many times pointed out the prejudicial attitude of this gentlemen, I think that it permeated the whole decision of the Board, not just his act, but the whole decision of the Board and in allowing it to happen, and I think he should have been asked by the Chairman to step down and I think that, and I thought that I crystally clear found that *the Board was in violation of his rights,* but the active ingredient to make the Board recalcitrant with respect to his civil rights was this Mr. B. So I can't make it clearer than that.

(Emphasis added) Appendix D, 57a-58a. Furthermore, in its Order dated April 14, 1993 the court specified in its findings:

> The Dover Township Rent Leveling Board (hereinafter "the Board") violated plaintiffs' due process rights during the course of

> hearings on a rental increase application which commenced on or about June 19, 1990.

Appendix D, 54a.

In sum, the Board plainly mischaracterizes the record below with respect to the trial court's specific finding that the entire Board was affected by the biased conduct of Mr. Baltarzuk. Even if this were not the case, the Rivkins vigorously assert that the participation of a single openly biased board member is sufficient to constitute a violation of substantive due process rights especially where the Board repeatedly refuses to disqualify that Board member at numerous public meetings where he openly declares his adversarial position.

CONCLUSION

For the reasons set forth herein and for the reasons stated in the Petition and supporting *Amicus* briefs, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and the judgment of the New Jersey Supreme Court should be reversed.

Respectfully submitted,

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